APPEAL NO. 93036

On October 6 and November 18, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The hearing officer determined that the appellant (the claimant herein) failed to establish that he sustained an injury at work on (date of injury); that he did not have disability; that he did not give timely notice to his employer of his claimed injury; and that he did not have good cause for failing to timely file his claim for compensation with the Texas Workers' Compensation Commission. The claimant disagrees with certain findings of fact and conclusions of law and requests that we reverse the hearing officer's decision. Respondent (herein the carrier) responds that the claimant's appeal is not timely and requests that we affirm the hearing officer's decision. However, the carrier also disagrees with certain findings of fact, which findings the claimant agrees with.

DECISION

The decision of the hearing officer is affirmed.

The claimant's request for review was timely filed. Article 8308-6.41(a) provides that a party that desires to appeal the decision of the hearing officer shall file a written appeal with the Appeals Panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division of hearings. The cover letter accompanying the mailing of the hearing officer's decision is dated December 21, 1992; however, Commission records show that the decision was actually mailed on December 22, 1992. The claimant states that he received the decision on December 26, 1992. Under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(c) (Rule 143.3(c)), a request for review is presumed to be timely filed if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision, and is received by the Commission not later than the 20th day after the date of receipt of the decision. Rule 102.3(a)(3), relating to due dates and time periods for filings and notices required under the 1989 Act, provides that if the last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday. The 15th day after the date the claimant received the decision was Sunday, January 10, 1993. Therefore, his period for filing his appeal was extended to Monday, January 11th. The envelope in which the claimant mailed his request for review is postmarked January 11, 1993, and the request was received by the Commission on January 13, 1993. Consequently, under Rule 143.3(c), the claimant's request for review is presumed to be timely filed.

The carrier's response is dated January 27, 1993, and was received by the Commission on January 28, 1993. It cannot be considered as a request for review since it was not filed within 15 days of receipt of the hearing officer's decision (the carrier is deemed to have received the decision on December 27, 1992 under Rule 102.5(h)). However, it will be considered as a timely filed response to the claimant's request for review.

The carrier was represented by an attorney. The claimant was not represented by an attorney, but was assisted by a Commission Ombudsman.

The issues at the hearing were: (1) whether the claimant sustained an injury as a result of chemical exposure on (date of injury); (2) whether the claimant suffered disability as a result of the alleged injury of (date of injury); (3) whether the claimant gave timely notice of his injury of (date of injury) to his employer; and (4) whether the claimant has good cause for failure to timely file a claim for compensation with the Commission for an injury on (date of injury).

The claimant claims that he has suffered recurring headaches as a result of chemical exposure at work on (date of injury). He filed a claim for compensation with the Commission for this injury on July 13, 1992. Much of the claimant's testimony and medical evidence overlapped with his workers' compensation claim for an eye injury sustained on April 26, 1991. The April 26th injury was the subject of Texas Workers' Compensation

Commission Appeal No. 92402, decided September 23, 1992. In Appeal No. 92402, the Appeals Panel affirmed another hearing officer's decision that the claimant failed to prove that his April 26th eye injury caused the claimant's headaches and that his eye injury did not cause disability. The April 26th eye injury occurred when foreign bodies got into the claimant's eyes while he was working below welders at work.

The claimant testified that on Saturday, (date of injury), his eyes were watering when he went to work and he reported to his supervisor that he had injured his eyes at work the day before. He said his foreman asked him to go into a water box and wire brush some rust spots with "50/50 thinner." The claimant said that his eyes started hurting worse and that he reported to his foreman that he had to leave because his eyes were watering and hurting real bad. He left work about 11:30 a.m. and that afternoon called his superintendent and told him his eyes were hurting worse, that he had real bad headaches, and thought he needed to see a doctor. He said his superintendent said that on Monday he would take him to a doctor. On April 28th the claimant went to the hospital and had two foreign bodies removed from his eyes. On April 29th he went to an ophthalmologist, who removed another foreign body from his eye. He said he told the Dr. T about being exposed to chemicals on April 27th. The claimant further testified that he complained to Dr. A that he had blurred vision, headaches, was unable to sleep at night, and that he had been exposed to chemicals. He said that he was prescribed eyeglasses and was referred to Dr. D He said he told Dr. D about the chemical exposure and was referred to a neurologist, Dr. P. The claimant said he also saw several other doctors.

The claimant said that he did not realize what "exposure can do to you" until March 1992 when he received a Material Safety Data Sheet on thinner no. 15 from the carrier. This document listed health hazard data as follows:

> INHALATION: harmful if inhaled. May affect the brain or nervous system, causing dizziness, headache or nausea. May cause nose and throat irritation. CONTACT: May cause eye and skin irritation. NOTE: Reports have associated repeated and prolonged occupational overexposure to solvents with permanent brain and nervous system damage. MEDICAL CONDITIONS PRONE TO AGGRAVATION BY EXPOSURE. If you have a condition that could be aggravated by exposure to dust or organic vapors see a physician prior to use. PRIMARY ROUTE(S) OF ENTRY: Inhalation, Dermal, Ingestion.

Hospital reports of April 28, 1991, showed that foreign bodies were removed from the claimant's eyes, but there is no mention of chemical exposure. On April 30, 1991, Dr. A released the claimant to light duty work. Dr. A reported that the claimant continued to complain of headaches through May 22, 1991, and that Dr. D reported on May 23, 1991 that the claimant had normal vision 20/40 and 20/30. In a report dated July 9, 1991, Dr. P said

that the claimant complained of headaches and blurred vision, and reported the history of present illness as welder burns with metal foreign bodies in both eyes on April 26th and being put in a tank and asked to scrub walls with a 50/50 solution of paint remover and water on April 27th. Dr. Ps assessment of the claimant's condition was "[p]ost traumatic headache, in a patient with a history of headaches. This is probably due to the injury he sustained and the blurred vision is due to the astigmatism." In a Neuro-Ophthalmic Evaluation report of August 14, 1991, Dr. T reported that the claimant complained of headaches and blurred vision, and gave her impression of the claimant's condition as "1.) headache syndrome related to chemical exposure vs migraine. 2.) No ocular pathology found other than old corneal scars." The results of an electroencephalogram of March 13, 1992 were normal. Dr. S, a neurologist, reported on March 27, 1992 that she had examined the claimant on March 10, 1992, that the claimant complained of headaches and difficulties with both eyes, and that her impression was "tension vascular headaches." Dr. S further stated that "[t]he patient had a history of headaches prior to his ocular injury, however, his headaches seem to have been exacerbated by that injury and therefore, they are an exacerbation of a preexisting condition." At the carrier's request, Dr. S performed a neurologic evaluation on the claimant on May 28, 1992, and gave the following impression:

> [The claimant] has complaints of ongoing headaches and blurred vision resulting from some type of exposure on 4/26/91. Although he was found to have foreign bodies in each eye on 4/28/91, I cannot relate his ongoing symptoms to those foreign bodies. Symptoms associated with ocular foreign bodies, in all reasonable medical probability, will resolve within two to three days. Any problem with ongoing headaches are, in my opinion, totally unrelated.

Dr. S report gave a history of injury related to the claimant's work on April 26, 1991, while working below welders and experiencing burning in his eyes, but does not mention his work with 50/50 thinner on (date of injury).

In a letter to the carrier's attorney dated August 25, 1992, Dr. S stated:

> I am in receipt of a data sheet from the C Company regarding product thinner #15. I am also aware of the complaints of [the claimant] consisting of burning in his eyes, blurred vision, watering of his eyes, and headaches.
>
> It is possible that a chemical exposure would cause transient symptoms as he has described but in all reasonable medical probability, it would in no way cause ongoing symptomatology beyond 72 hours. In other words, I can see no cause and effect relationship between any possible exposure and the symptoms that [the claimant] is currently complaining of.

The hearing officer found that the evidence did not establish, within the standard of reasonable medical probability, that the claimant's headaches since (date of injury) were caused by chemical exposure at work on (date of injury); and further found that the evidence did not establish, within the standard of reasonable medical probability, that the claimant sustained an injury on (date of injury) as a result of chemical exposure. The hearing officer concluded that the preponderance of the credible evidence did not establish, within the standard of reasonable medical probability, that the claimant sustained a compensable injury on (date of injury) as a result of chemical exposure while he was in the course and scope of his employment with the employer.

Pursuant to Article 8308-6.34(e), the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. The hearing officer resolves conflicts and inconsistencies in the testimony of expert medical witnesses, and judges the weight and credibility to be given their testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In this case, there were expert medical opinions ascribing the claimant's blurred vision to an astigmatism, and his headaches to tension. There was also an expert medical opinion that the claimant's symptoms are not related to any possible exposure to thinner. We do not substitute our judgment for that of the hearing officer where, as here, there is sufficient evidence to support the findings. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). The findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

In regard to disability, the hearing officer concluded that since the claimant did not sustain a compensable injury on (date of injury), he did not have disability as defined by the 1989 Act. "Disability" means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). Consequently, in order to have disability as defined by the 1989 Act, there must be a compensable injury. Since there is no compensable injury, the hearing officer's conclusion that the claimant does not have disability is correct.

Concerning the issue of timely notice of injury to the employer, Article 8308-5.01(a) provides that the employee or a person acting on the employee's behalf must notify the employer of an injury not later than the 30th day after the date on which the injury occurs. An employee's failure to notify the employer as required under Article 8308-5.01(a) relieves the employer and the carrier of liability, unless the employer or the carrier has actual knowledge of the injury or the Commission determines that good cause exists for failure to give notice in a timely manner. The claimant testified that while he reported his injury of April 26, 1991 to his employer, he never reported to his employer that he had been injured

by exposure to chemicals on (date of injury). The hearing officer found that the claimant did not ever report to his employer an injury or aggravation that occurred while he was at work on (date of injury), and concluded that the claimant did not report to his employer a chemical exposure injury occurring on (date of injury) within 30 days after (date of injury). While the hearing officer's finding and conclusion are supported by the evidence, we are concerned that there may have been actual notice to the employer of the claimant's alleged injury of April 27th. The employer knew that the claimant was using the thinner on April 27th and knew that the claimant had to leave work early because his eyes hurt and were watery on that day. Of course, the employer may have attributed the claimant's complaints to the events of the preceding day and not connected his complaints to his work on April 27th. The evidence was not well developed on this point. We are also concerned that the claimant may have had good cause for failing to notify his employer of his claimed injury of April 27th. The claimant testified that he believed that his eye injury of April 26th and his claimed injury from exposure to chemicals constituted one injury, that Dr. P seemed to have reported the events of both days as one injury, and that he, the claimant, notified his employer of the accident and injury of April 26th. Again, the evidence was not developed as well as it might have been on this point and we observe that the claimant had the burden to show good cause for failure to timely notify his employer of his claimed injury, and that the burden was on the claimant to show the continued existence of good cause until notice is given. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.); Texas General Indemnity Company v. McIlvain, 424 S.W.2d 56 (Tex. Civ. App.-Houston [14th Dist.] 1968, writ ref'd). In any event, had the hearing officer determined that the employer had actual knowledge of the claimed injury or that there was good cause for failing to give timely notice, it would not entitle the claimant to workers' compensation benefits for his claimed injury of (date of injury), since the hearing officer's determination of no compensable injury on that date is supported by the evidence.

As to the issue of whether the claimant had good cause for failure to timely file a claim for compensation with the Commission for an injury of (date of injury) (the claim was filed on July 13, 1992), Article 8308-5.01(b) provides that for an injury, the claim must be filed with the Commission not later than one year after the date of the occurrence of the injury. Article 8308-5.03 provides that an employee's failure to file a claim for compensation with the Commission as required under Article 8308-5.01(b) relieves the employer and the carrier of liability unless good cause exists for failure to file a claim in a timely manner, or the employer or carrier does not contest the claim. It is clear that the claimant's claim for compensation for his claimed injury of (date of injury) was not filed within the one year statutory time period. In Hawkins v. Safety Casualty Co., 207 S.W.2d 370 (Tex. 1948), the Supreme Court of Texas stated:

> The term "good cause" for not filing a claim for compensation is not defined in the statute, but it has been uniformly held by the courts of this state that the test for its existence is that of ordinary prudence, that is, whether the claimant

prosecuted his claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Consequently, whether he has used the degree of diligence required is ordinarily a question of fact to be determined by the jury or the trier of facts. It may be determined against the claimant as a matter of law only when the evidence, construed most favorably for the claimant, admits no other reasonable conclusion.

In this case the hearing officer made the following finding of fact:

FINDING OF FACT

11.The claimant did not file an NICC (TWCC-41) with the Commission concerning an injury on (date of injury) until July 13, 1992 because: 1) he was unfamiliar with the requirements of the Texas Workers' Compensation Act and the implementing Rules; 2) he had already (timely) filed an NICC for his eye injury of April 26, 1991 and he did not realize that he had to file another for his exposure on (date of injury); 3) the claimant was under the impression that the events and circumstances that occurred on April 26, 1991 and (date of injury) involving his eyes, in combination produced one injury and not two separate injuries; 4) the claimant felt that Dr. P, who was a doctor from whom the claimant obtained treatment for his eyes, considered the events and circumstances of both April 26, 1991 and (date of injury) to produce one injury as opposed to two separate injuries; and 5) the claimant did not receive the Material Safety Data Sheet for thinner No. 15, which was the paint remover that the claimant was using on (date of injury), until March, 1992, and that is how the claimant learned that exposure to the substances that are contained in thinner No. 15 can cause headaches.

The hearing officer concluded that there was no good cause for the claimant's failure to file a claim with the Commission regarding his claimed injury on (date of injury) within one year thereafter. We first observe that not knowing of the existence of the filing requirements is not good cause for delayed filing of a claim for compensation. Allstate Insurance Company v. King, 444 S.W.2d 602 (Tex. 1969). We think that, taken together, subparts 2 through 5 of Finding of Fact No. 11 make a strong case for the existence of good cause for failing to timely file the claim for compensation under the test set forth in Hawkins, *supra*. However, the claimant had the burden to show the continued existence of good cause until the claim was filed. Texas General Indemnity Company v. McIlvain, 424 S.W.2d 56 (Tex. Civ. App.-Houston [14th Dist] 1968, writ ref'd). In any event, as with the notice issue, had the hearing officer concluded that the claimant had good cause for the delay in filing his

claim for compensation, the claimant still would not be entitled to workers' compensation benefits for his claimed injury of (date of injury), because the hearing officer determined that the claimant did not sustain a compensable injury on that day and we have found the evidence sufficient to uphold that determination.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge